In the Supreme Court of the United States

OCTOBER TERM, 1971

MOTION FILED
OCT 7 1971

Supreme Court, U.S.
FILED
OCT 16 1971
MICHAEL RODAK, JR., C

No. 71-1315

HOWARD ALEXANDER, et al.,
Petitioners,

vs.

COMMONWEALTH OF VIRGINIA
Respondent.

On Writ of Certiorari to
The Supreme Court of Virigina

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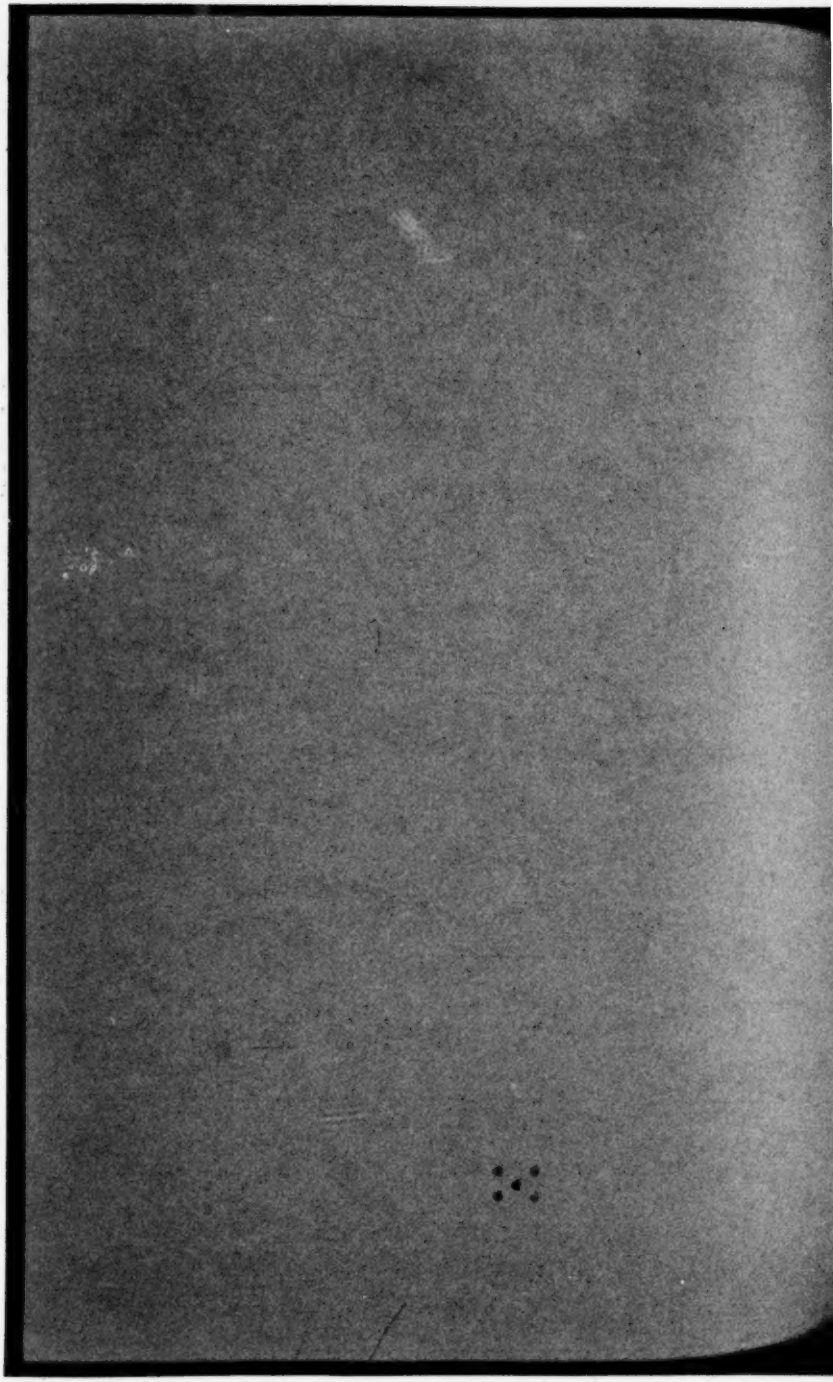

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Joel Hirschhorn, Esq., Ralph J. Schwarz, Jr., Esq., and Mel S. Friedman, Esq., on behalf of The First Amendment Lawyers' Association, as Amici Curiae in Support of Petitioners.

Joel Hirschhorn is a member of the bar of the State of Florida and of the United States Supreme Court. He has been involved in litigation in both Federal and State courts involving the issues presented by this Amici Curiae Brief.

In accordance with the rules of this Court, consent to the filing of a Brief Amici Curiae was sought and obtained from attorneys for the Petitioners HOWARD ALEXANDER, et al., and Respondent COMMONWEALTH OF VIRGINIA, and is being filed simultaneously with the Brief herein with the Clerk of this Court.

Mr. Hirschhorn has associated with him on this Brief Ralph J. Schwarz, a member of the bar of this Court and of the State of New York. Mr. Schwarz is presently involved in litigation in both Federal and State Courts involving the same issues presented here.

Also associated on this Brief is Mel S. Friedman, a member of the bar of the State of Texas and of the United States Supreme Court. Mr. Friedman has also been involved in litigation in both Federal and State Courts involving the same issues presented here.

Messrs. Hirschhorn, Schwarz, and Friedman have prepared and presented this Brief on behalf of the First Amendment Lawyers' Association which consists of approximately seventy-five (75) attorneys practicing law throughout all State and Federal courts in the United States and who deal primarily with First Amendment and related issues.

Amici have attempted to limit the issue presented to a narrow issue dealing with a right of adults to receive materials under the First Amendment. A brief historical review of the development of the First Amendment is presented in order that the Court can properly view the complex question of the protection of the First Amendment in light of the historical development of this right. Considerable reference is made to The Report of the Commission on Obscenity and Pornography prepared pursuant to Public Law 90-100 and published by the United States Government Printing Office, Washington, D.C.

ARGUMENT

WHETHER, UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION, AN ADULT, PREVIOUSLY FOREWARNED, HAS THE ABSOLUTE RIGHT TO BUY, SELL, RECEIVE, WRITE, PUBLISH, DISTRIBUTE, DISSEMINATE AND/OR EXHIBIT HARD CORE PORNOGRAPHY AND OBSCENE MATERIAL TO OTHER PREVIOUSLY FOREWARNED ADULTS PROVIDING THERE IS NO ASSAULT OR INTRUSION UPON THE SENSIBILITIES OF OTHER NON-INTERESTED ADULTS, NO PANDERING, NOR JUVENILE INVOLVEMENT?

A. HISTORICALLY THE FIRST AMENDMENT PROTECTS PORNOGRAPHY AND OBSCENITY.

The Amici contend that historically the First Amendment to the United States Constitution was never intended to deny protection to pornography and obscenity. In short the **Roth-Alberts** conclusion that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. 476, 485 (1957), is historically incorrect. Like Mr. Justice Douglas, see **Memoirs v. Massachusetts**, 383 U.S. 413 (1966), 428-433 (concurring opinion, Mr. Justice Douglas), Amici contend that "obscenity" was **not** an established exception to the First Amendment guarantee of Free Speech and Press when the Bill of Rights was adopted in 1791.

During the fight for ratification of the United States Constitution it became apparent that many prominent colonialists were deeply troubled by the apparent sweeping powers of the new Federal Government. These concerns were met when, led by James Madison, twelve proposed amendments were approved by Congress in September, 1789. Ten of these were ratified by the individual States and on December 15, 1791, the "Bill of Rights" became part of the United States Constitution. It is significant to note that at the time of the enactment of these amendments:

1. Only one colony, Massachusetts, had a statute prohibiting "intemperance, immorality and profaneness", which was enacted in 1711; the first State statute prohibiting commercial distribution of obscenity was enacted in Vermont in 1821; the first Federal statute, was enacted in 1842.

2. Lumped together with religion, Freedom of Speech was clearly intended to be as absolute as the right of one to choose his own form of religious worship.

3. The mandatory language of the First Amendment, like that of the other nine amendments, make it clear that absent overwhelming justification, the Freedoms of Religion, Speech, Assembly and Petition are absolute.

4. Only specific, narrow exceptions to these limitations on the powers of the new Federal Government would be permitted, such as criminal libel, and the Alien and Sedition Acts. The reports of the First Congressional debates regarding these proposed amendments are ap-

parently incomplete but inference is clear that the Bill of Rights was intended to curb and not extend Federal (i.e. Governmental) Powers, see Kronvitz, **Fundamental Liberties of a Free People: Religion, Speech, Press, Assembly**, pp. 345-361 (1957).

5. The First Amendment guarantee of Freedom of Speech and Press was designed to insure absolute freedom from governmental control of the newspaper and publishing industry in general, and was not intended as a proscription against obscenity or pornography because the publication of such material was not a secular crime at Common Law in 1791, see Point C, infra.

Thus it is clear that the **Roth-Alberts**, supra, conclusion of obscenity is not protected is incorrect, and ought to be reversed.

B. OBSCENITY PER SE FALLS WITHIN THE PROTECTION OF THE FIRST AMENDMENT.

As stated, **Roth v. U.S.**, supra, held that obscenity was outside the protection of the First Amendment based on premises stated in that decision which Amici submit on reconsideration are not constitutionally valid for either the several States or the Federal Government. Indeed, it is submitted there is no valid justification for the automatic exclusion from First Amendment protection of a form of expression called obscenity. In fact, and law, there are compelling reasons consistent with the First Amendment why it should not be excluded. Moreover, where the exercise of First Amendment rights is claimed to be abridged, it is the function of this Court to weigh the

circumstances and appraise the substantiality of the reasons advanced in support of such laws and regulations, **Thornhill v. Alabama,** 310 U.S. 88, 95, 96 (1940). By obscenity Amici refer, of course, to the material itself or the obscenity per se on the assumption that the mode of commercial distribution is such that only a willing, consenting adult, who has been previously forewarned of the contents is the purchaser or viewer. While the justifications advanced for the automatic exclusion of obscenity tend to overlap they break themselves generally into three categories.

The first justification for claiming that obscenity is outside the pale of the First Amendment stems from the fact that laws regulating profanity, blasphemy and criminal libel had been deemed, especially in the early stages of the formation of the Union, to be outside the protection of the First Amendment. The essential rationale underlying the justification for excluding such utterances from First Amendment protection, as set forth in **Beauharnais v. Illinois,** 343 U.S. 250, 256, 257 (1952), and **Chaplinsky v. New Hampshire,** 315 U.S. 568, 571-572 (1942), is that "fighting words" which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. By dicta, habit and automation stemming, undoubtedly, from a lack of any real need to focus on the issue, obscenity was always linked with the profane and libelous utterance. However, the rationale for the **automatic** exclusion of the profane and criminally libelous utterance has been seriously undermined and essentially overruled recently in **Ashton v. Kentucky,** 384 U.S. 195 (1966), **Cohen v. California,** 403 U.S. 15 (1971), **Cantwell v. Connecticut,** 310 U.S. 296 (1940). Hence, the justification for the automatic exclusion of obscenity must

fall. Moreover, assuming any justification for the automatic exclusion of criminal libel, a libel does inflict injury because it is false and is not any step in the search for truth because the libel by its very nature is false. A picture of a man and woman engaged in coitus when viewed by one who wants to view it does not inflict any injury on the viewer and is not per se false.

The second justification for the automatic exclusion of the obscene is the erroneous assumption that the First Amendment protects only the expression of ideas, connoting an intellectual communication. The First Amendment however, protects every expression and communication be it for purposes of entertainment, amusement, or fulfilment of a person's intellectual or emotional needs, and regardless of its worth, and is not limited just to the expression of an idea, **Winters v. New York,** 333 U.S. 507, 510 (1948), **Hannegan v. Esquire,** 327 U.S. 146 (1946), see also 72 Y.L.J. 877, 879 (1962).

The third apparent justification is that the viewing of obscenity leads to anti-social conduct and illegal behavior, and has an adverse impact on personality, and an adverse moral impact. There is virtually no scientifically accepted empirical data that obscenity or pornography lead to any crimes of sexual violence or other anti-social behavior as this Court has already recognized, **Stanley v. Georgia,** 394 U.S. 557, at 566 nt 9 (1969). Indeed, the data collected shows no causal relationship between "obscenity" and any criminal conduct, see generally Report of President's Commission on Obscenity and Pornography and Point D, infra.

The argument that obscenity has an adverse moral impact serves to emphasize the fact that obscenity does indeed convey ideas (although presumably bad), otherwise there would be no objection to it.

1. THE PROFANE AND LIBELOUS FIGHTING WORDS EXCEPTION.

As stated above the automatic exclusion of obscenity as being outside the penumbra of the First Amendment sought to be justified is by analogy to the exclusion of the profane and the libelous. Recently, however, the premise underlying **Chaplinsky**, supra, has been denounced and there is now no justification for the exclusion of the so-called "obscene".

In **Cohen v. California**, supra, the defendant was convicted of violating a section of a California Penal Code which prohibited maliciously and willfully disturbing the peace and quiet of any neighborhood or person by offensive conduct. The defendant's conduct consisted of wearing a jacket in a Los Angeles, California, Courthouse which bore the words "Fuck the Draft". In common parlance, these words would certainly be considered profane and vulgar and as the Court observed, 403 U.S. 20, words "not uncommonly employed in a personally provocative fashion". Despite the fact that these words are generally regarded as profane, vulgar and used as an insult, the Court held the conviction could not stand on the grounds that while the use of the words was inherently likely to cause violent reaction, it was not shown that the words were directed at any one, and that the phrase in question

demonstrated defendant's feelings. The case also demonstrates a clear reversal of the **Chaplinsky** principle.

In **Ashton v. Kentucky**, 384 U.S. 195 (1966), the petitioner was convicted for committing the common law crime of criminal libel. This Court held the statute in question unconstitutional and reversed the defendant's conviction. In doing so, this Court relied in great part on cases involving breach of the peace offenses and especially **Cantwell v. Connecticut**, 310 U.S. 296 (1940), Cantwell was convicted for breach of the peace for playing a phonograph record, in a public place, which attacked religion and the Catholic church in general. When a listener objected Cantwell left. In **Cantwell**, supra at 309, this Court pointed out that provocative language amounting to a breach of the peace has almost always consisted of "profane, indecent or abusive remarks directed to the person of the hearer". In short then, this Court has recognized in the case of the profanity and the criminal libel that it is not just a matter of the public utterance of the words per se but rather whether the words are directed at a particular hearer under circumstances where he cannot avoid them.

The profane and the criminal libel are not therefore just automatically excluded from First Amendment protection. The States do not have the power to regulate such utterances or the basis that they are automatically outside the protection of the First Amendment. The presumption then that the so-called obscene is automatically excluded from First Amendment protection must likewise fall, for the justification for the automatic exclusion of obscenity has stemmed from the automatic exclusion of utterances which are ipso facto profane or libelous.

Moreover, it is hard to understand the rationale for the conclusion that the obscene and profane is outside the First Amendment except that historically they had been erroneously linked and that the "obscene" was bad and, therefore, deemed an insult. In addition, there is even less basis for the automatic exclusion of the "obscene" where purchased or viewed by a consenting forewarned adult. There is absolutely no basis to conclude that such utterances could inflict injury on such a consenting adult.

Amici's position is strengthened by two recent decisions of this Honorable Court, **Gooding v. Wilson**, 405 U.S. 518 (1972), and **Rosenfeld v. New Jersey**, ____ U.S. ____, 33 L.Ed.2d 321 (1972). In **Rosenfeld**, supra, this Court vacated and remanded appellant's conviction under a New Jersey statute prohibiting the use of profane or indecent language in a public place in light of **Gooding**, supra, and **Cohen**, supra. In **Rosenfeld**, supra, appellant had used the phrase "Mother Fucker" on four separate occasions to describe the teachers, school board, the town, and the United States of America, at a public school board meeting attended by about 150 people, 25 of whom were minors, and 40 of whom were women (and thus presumably sensitive to such language). Even dissenting Justice Powell recognized, however,

> But our free society must be flexible enough to tolerate even such a debasement provided it occurs without subjecting unwilling audiences to the type of verbal nuisance committed in this case, 33 L.Ed.2d at 324.

2. THE FIRST AMENDMENT PROTECTION IS NOT LIMITED TO THE EXPRESSION OF IDEAS AND FURTHER OBSCENITY CONVEYS IDEAS.

This Court has recognized that the First Amendment is not limited to the exposition of only popular ideas but covers expressive matter commercially distributed even though it is entertaining or vulgar, **Winters v. New York**, supra, 335 U.S. 507, 510 (1948), **Hannegan v. Esquire**, 327 U.S. 146, supra. In **Cohen v. California**, supra, 403 U.S. at 26 this Court recognized that an expression conveys "not only ideas but otherwise inexpressible emotions as well".

While the search for the truth through ideas is one very critical basis for the First Amendment, it is not the only basis. Clearly, the First Amendment protects non verbal expession, see 72 Yale L.J. 877, 879, (1962).

The justification for excluding obscenity on the assumption that the First Amendment protects only the written or verbal expression of an idea is therefore not accurate. Furthermore, this question of whether even obscene expressive utterances (or publications) are to be excluded on the grounds that such material conveys no ideas itself refutes one of the justifications for excluding obscenity. 79 Yale Law Journal 209, 211, 212, (1969-70).

One of the basis for excluding obscenity is allegedly that it has a harmful moral impact and leads to the disintegration of the moral fibre. Assuming this to be a justification (though it is not) obscenity could not have such an impact unless it did indeed present ideas and

stimulate argument and debate. 79 Yale Law Journal 211, 212, 216, (1969-70).

We live in a highly mobil, fragmented society with woman's equality a foregone conclusion, if not yet a realty. The role of sex in society is a critical one. The presentation of the so-called obscene forces people to reevaluate their own attitudes on this subject. In fact, even the so-called obscene aids in the never ending search for the truth. The so-called obscenity reflects in major part a change in attitudes about sex and is one factor which helps people to evaluate and reevaluate their ideas and attitudes about the roles of men and women and sex attitudes in our ever changing society. The notion that obscenity does not convey an idea is simply not true, 79 Yale L. J. at 215, 216. If pornography did not convey ideas there would be no murmur (much less the hue and cry), about its presentation to consenting adults.

3. THERE IS NO CASUAL RELATIONSHIP BETWEEN PORNOGRAPHY AND HARMFUL CONDUCT.

As stated, this Court has already recognized that there is little, if any empirical evidence that obscenity induces crimes of sexual violence, **Stanley v. Georgia**, supra. There is no scientific basis for a presumption that it induces violent conduct or crimes of any kind and governmental studies have shown the contrary, see the Report of the Commission on Obscenity and Pornography, supra.

Thus, this Court has stated:

> Criminal statutory presumptions must be regarded as irrational or arbitrary and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, **Leary v. United States**, 395 U.S. 6, 89 S.Ct. 1532, 1548 (1969).

Of course, the most widely recognized exception to the First Amendment is where the exercise of the Freedom of Speech and/or Press results in or creates a "clear and present danger" to society or some segment thereof, **Schenck v. United States**, — U.S. —, 39 S.Ct. 247 (1919). That is, will the exercises of the First Amendment in the manner under review, "bring about the substantive evils that Congress has a right to Prevent"? As asserted in **Schenck**, supra, this question is one of "proximity and degree".

In light of the conclusions of the extensive studies, (i.e. the Report of the Commission on Obscenity and Pornography), done at Presidential request and governmental expense, how can it be argued that obscenity and pornography is not entitled to the protection of the First Amendment? Assuming the conclusions of the Report to be true, even hard core pornography has no harmful impact on the recipient and thus creates no "clear and present danger". It follows therefore that there is no constitutional justification for the continued governmental repression and suppression of sexually oriented material.

This conclusion is even further strengthened by this Court's holding that:

> The Government "thus carries a heavy burden of showing justification for the imposition of such a [i.e. prior] restraint". **New York Times Company v. U. S.** [Pentagon Papers Case] — U.S. —, 91 S.Ct. 2140 (1971).

Neither the States nor the Federal Governments can sustain justifying prohibiting forewarned consenting adults from buying, selling, receiving, writing, publishing, distributing, disseminating or exhibiting obscene materials to other consenting forewarned adults.

C. WHETHER FOREWARNED CONSENTING ADULTS HAVE THE ABSOLUTE RIGHT TO ENJOY FOR THEIR OWN PRIVATE PERSONAL ENTERTAINMENT AND/OR DESIRE HARD CORE PORNOGRAPHY AND OBSCENITY.

> The rights guaranteed by the Constitution or otherwise are not absolute rights in the sense that they entitle a citizen to act in any way he pleases. Rather he must exercise his rights in such a way that the rights of others are not denied. . . Honorable Sam J. Ervin, Jr. (D., N.C.) "Layman's Guide to Individual Rights Under the United States Constitution," 3rd Ed. (Government Printing Office, Washington, D. C., 1972).

Assuming, arguendo, Senator Ervin's remarks that constitutional rights are not absolute, to be true, it is clear that so long as one's private acts do not disparage the rights of others, this right (of privacy) is absolute. And, if this Court accepts the conclusions of the Report of the Commission on Obscenity and Pornography, infra, then a forewarned consenting adult has the absolute right to receive for his (or her) own private enjoyment or entertainment, or use, even hard core sexually oriented material of the most depraved and foul nature imaginable, **Stanley v. Georgia,** 394 U.S. 557 (1969). Of course, this absolute right to receive under the protective penumbra of the First and Ninth Amendments, **Griswold v. Connecticut,** 381 U.S. 479 (1965), is meaningless unless some other adult (individual or corporate) has the absolute right to offer for sale or exhibition the materials necessary to meet this right receive, **U. S. v. Langford,** 315 F.Supp. 193, (Minn. 1970), and **U. S. v. Lethe,** 312 F.Supp. 421 (Cal. 1970).

Amici's position stated simply is that:

1. The right to buy, receive, write, publish, distribute, disseminate, sell, or exhibit hard core pornographic and obscene material was protected, at Common Law, from secular courts.

2. The Ninth Amendment to the Constitution protects and preserves for the people all rights they enjoyed prior to the enactment of the United States Constitution.

3. Present case law protects and preserves private sexual acts of consenting adults.

4. Both the Fourteenth Amendment equal protection of the laws clause and **Stanley v. Georgia**, supra, protects the right to receive and the collateral right to sell or exhibit hard core pornography and obscene materials provided of course there is no pandering, juvenile involvement, nor intrusion upon the sensibilities of unwilling adults. Amici will treat each of these four arguments separately.

1. THE COMMERCIAL PUBLICATION, DISTRIBUTION, SALE AND/OR EXHIBITION OF OBSCENE MATERIAL WAS NOT A CRIME, AT COMMON LAW, PUNISHABLE BY SECULAR COURTS.

The crime of publishing, distributing, selling, and/or exhibiting obscene material is of recent vintage. Some eighty-three (83) years prior to the enactment of the First Amendment, the Star Chamber held in a per curiam opinion, that:

> A crime that shakes religion (a), as profaneness on the stage, & c. is indictable (b); but writing an obscene book, as that entitled "The Fifteen Plagues of a Maidenhead," FPM, is not indictable but punishable only in the Spiritual Court (c). **Queen v. Read,** Case No. 205, Michaelmas Term, 6 Queen Anne, S.C., 2 Stra. 789, 11 Mod. Rep. 142 (1708).

Subsequent British Decisions punished, initially, "obscene libel", **King v. Curl**, 2 Stra. 788 (1727); but it was not until 1824 that a statute was enacted in England permitting **secular** prosecution for a public exposure of ob-

scene material, 5 Stat. Geo. 4, C. 83. Thus, at the time of the enactment of the Ninth Amendment, obscenity, (i.e., eroticism sans blasphemy), was **not** a crime in England.

Moreover, only one colony, Massachusetts, had a statute prohibiting commercial obscenity prior to 1791, (this statute was entitled "an act against intemperance, immorality, and profaneness, and in reformation of manners"). The other colonies left the question of obscenity to the Spiritual Courts. The first state to enact a statute prohibiting commercial distribution of obscenity was Vermont in 1821, Laws of Vermont, 1824, Ch. XXIII, No. 1, Section 23. And, it was not until twenty-one (21) years thereafter that Congress enacted its first law prohibiting the introduction of obscene material into the United States, 5 U.S. Stat. 566 (1842).

The Report of the Commission on Obscenity and Pornography, at page 297-298, traces the history of the merger of religious profaneness, blasphemy and obscenity. The conclusion is inescapable that when **Read**, supra, was acquitted in 1708 for writing the sexually obscene book, "The Fifteen Plagues of a Maidenhead", because the book libeled no one, did not attack the Government of England, and was not blasphemous, the matter was one best left to the "Spiritual Court".

The Ninth Amendment of course provides that:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

In essence, the Ninth Amendment means that whatever rights the people had at Common Law were retained by the people **despite** the ratification of the United States Constitution in 1789. The next step then is both logical and simple. If, at Common Law, a person had the right to write, without being punished, a sexually obscene book, c.f. **Read,** supra, then this right survived the enactment of the United States Constitution and the Amendments thereto. It is elemental that statutes in derogation of Common Law are to be strictly construed. Thus the assumption that "obscenity is not protected," is erroneous and must fall.

2. THE NINTH AMENDMENT RIGHT OF PRIVACY PROTECTS AND PRESERVES THE RIGHT TO RECEIVE, OR VIEW, EVEN HARD CORE PORNOGRAPHY.

The Ninth Amendment, does not, per se, grant "substantive" rights. Rather, this, until recently little understood, Amendment preserves a basic right of man, the right of privacy. While at one time there appeared to be a great disagreement as to precisely what the Ninth Amendment meant, Garvey, Unenumerated Rights—Substantive Due Process, the Ninth Amendment, and John Stuart Mill, 1971 Wisc. L. Rev. 992, 928-932, this Court's opinion in **Griswold v. Connecticut,** 381 U.S. 479 (1965), may well have laid the intellectual and academic debate to rest.

In essence, **Griswold,** supra, held that the right of privacy, "between consenting married adults", is protected against State invasion, by the First Amendment when read with the other Amendments. The "penumbra

of rights" elucidated in **Griswold,** has of course been reaffirmed, most recently by this Court in **Eisenstadt v. Baird,** ____ **U.S.** __, 92 S.Ct. 1029 (1972). The question of whether this "right of privacy" is absolute or not is answered simply by the observation that individual liberties ought to be limited only when they are in conflict with the rights of others, **Public Utilities Commission v. Pollak,** 343 U.S. 451 (1952); and after all, that is precisely the proposition for which **Redrup v. New York,** infra, stands.

Stanley v. Georgia, supra, makes it clear that a man's home is the private castle in which he may, for his own personal wishes, enjoy hard core pornography. The "right of privacy" is more than a physical dwelling, however, it is the "privacy of thought," pure or otherwise, provided no one else is harmed. Our democracy functions, in large part, because we enjoy freedom of thought and access to even unpopular ideas. The Ninth Amendment protects this right. This Court must preserve that right and make it meaningful. If Rich **Stanley,** supra, has his right of privacy, so must everyman.

3. THE PRIVATE, SEXUAL ACTS AND CONDUCT, OF FOREWARNED ADULTS, ARE PROTECTED UNDER THE FIRST, FIFTH, NINTH AND FOURTEENTH AMENDMENTS.

It is not the function of our laws to impose a moral code; moreover, no immoral conduct, no matter how rehensible ought to be a basis for a criminal law unless the conduct is harmful to others, or self-destructive. The manner in which an **adult** conducts his own private affairs in life is his own personal matter. This right to be free

has been articulated by Mr. Justice Brandis in his now famous dissenting opinion in **Olmsted v. United States,** 277 U.S. 438 (1928), quoted with approval in **Stanley v. Georgia,** supra:

> The makings of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their **beliefs,** their **thoughts,** their **emotions,** and their **sensations.** They conferred, as against the Government, **the right to be let alone** — the most comprehensive of rights and the right most valued by civilized men. [Emphasis added.]

This right to be free has of course been expanded considerably since **Griswold,** supra, which of course dealt with the right of married adults to receive birth control devices and/or counseling; c.f. **Eisenstadt,** supra, which declared unconstitutional a Massachusetts statute which permitted married persons to obtain contraceptives to prevent pregnancy, but prohibited distribution of contraceptives to single persons for the same purposes. This Court in **Eisenstadt,** supra, went on to assert that:

> If the right of privacy means anything, it is the right of individual, married or single, to be free from unwarranted Governmental intrusion into matters so fundamentally affecting a person as their decision whether to bear or beget a child. See **Stanley v. Georgia,** 394 U.S. 557, 89

> S.Ct. 1243, 22 Lawyers Ed.2d 542 (1969). See also **Skinner v. Oklahoma, ex rel., Williamson,** 316 U.S. 5353, 62 S.Ct. 1110, 86 Lawyers Ed. 1655 (1942); **Jacobson v. Massachusetts,** 197 U.S. 11, 29, 25 S.Ct. 358, 362, 49 Lawyers Ed. 643 (1905), 92 S.Ct. 1038, [footnotes omitted].

In addition to the problems of birth control decided in **Griswold,** supra, and **Eisenstadt,** supra, much litigation and legal scholarship have centered on the problems of others and their private sexual conduct. For example with respect to Sodomy, see Hollis, "Criminal Law—Sexual Offenses — Sodomy — Cunnilingus, 8 Natural Resources J. 531(1968); Johnson, Sodomy Statutes — A Need for Change, 13 S.D.L. Review, 384 (1968); Note, Sodomy — Crime or Sin?, 12 University Fla. Law Review, 83 (1959), and also **Cotner v. Henry,** 394 F.2d 873 (1968); Abortion, **United States v. Vuitch,** 402 U.S. 62 (1972), and **State v. Barquet,** 262 So.2d 431 (Fla. 1972), and the cases cited therein, as well as **People v. Belous,** 80 Cal. Rptr. 354, 458 P.2d 194 (1969); Homosexual Activities, **Smayda v. United States,** 352 F.2d 251 (9th Cir. 1965). All of these cases have one common thread, like **Stanley,** supra, the question involved is a moral, not legal one.

Thus the basic question of the **function** of the law is raised. In the famous English Wolfenden Report of 1957, the authors concluded that:

> It is not . . . the function of law to intervene in the private lives of citizens or to seek to enforce any particular pattern of behavior, Wolfenden Report at 9-10.

Moreover, it is the function of the courts, if they are to protect individual liberties from Governmental encroachment to independently evaluate data with reference to the society in which the courts function, c.f. Doss & Doss, "On Moral, Privacy and the Constitution," 25 Univ. Miami Law Review 395, 404 (1971). Thus the Report of the Commission on Obscenity and Pornography and its conclusions with respect to private acts between consenting adults becomes significant when tested by the right of privacy.

Amici contend that the right to buy, sell and commercially distribute and/or exhibit hard core pornography is as protected as the woman's right to choose to bear children, and to freely choose one's own sex partner, provided there is no pandering, intrustion, or juvenile involvement. What man, what justice, what court can tell another man what to read, view, or think about in the privacy of his own thoughts?

4. FEDERAL AND STATE LEGISLATION WHICH SEEK TO PROHIBIT COMMERCIAL DISSEMINATION OF HARD CORE PORNOGRAPHY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Amici contend that obscenity legislation has a discriminatory affect under the Fifth and Fourteenth Amendments to the United States Constitution for which neither the Federal nor various State Governments have a rational basis. It is elementary that the Fifth and Fourteenth Amendments' Equal Protection Clauses prohibit the Fed-

eral and State Governments from enacting legislation which unreasonably and/or arbitrarily discriminates against one identifiable group or individually in favor of another, **Reed v. Reed,** ____ U.S. ____, 92 S.Ct. 251 (1971).

This Court in **Stanley v. Georgia,** supra, gave protection to obscene materials found in the sanctity, (and privacy), of the home. The result of this case coupled with obscenity legislation against public exhibition and distribution gave to the rich man who could afford to purchase (even) obscene materials the right to view same in his home while the poor person was precluded entirely from such conduct. The less fortunate could neither afford the initial purchase nor in the case of movies the paraphanalia which are necessary for private exhibition. Thus the poor **Stanley,** who is denied the right to view this material at a movie theatre, or book store, is by operation of law being discriminated against contrary to the Fifth and Fourteenth Amendments see **U.S. v. Langford,** supra, and **U.S. v. Lethe,** supra.

This Court has most recently held in **Mayer v. Chicago,** ____ U.S. ____, 92 S.Ct. 410 (1971), that a transcript could not be denied in a criminal case where a fine was imposed merely because the defendant could not afford to pay for the transcript. This Court stressed:

> **The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay** is not erased by any differences in the sentences that may be imposed. (Emphasis added.)

C.f. **Argersinger v. Hamlin**, U.S. Supreme Court Case No. 70-5015, ____ U.S. ____, 11 Cr.L. 3089 (June 12, 1972).

A similar situation arose in **Williams v. Illinois**, 399 U.S. 235 (1970), where this Court found an impermissible discrimination, resting on ability to pay, which existed when the aggregate imprisonment exceeds the maximum period fixed by statute and results directly from an involuntary nonpayment of a fine or court cost. See also **Boddie v. Connecticut**, 401 U.S. 371 (1971), Mr. Justice Douglas concurring, where indigents were denied equal protection of the laws in that they could not obtain divorces because of the expenses necessary to gain access to the courts.

Amici would further contend as emphasized above that a fundamental right is involved and thus both the Federal and State Governments must demonstrate an overriding and compelling interest to justify the discrimination. In **Skinner v. Oklahoma**, 316 U.S. 535 (1942), the court found marriage and procreation to be fundamental rights and further that the State showed no compelling State interest to justify sterilization of certain convicted felons and not others.

In **Shapiro v. Thompson**, 394 U.S. 618 (1868), this Court was faced with the constitutionality of waiting periods, i.e., residency requirements, for welfare recipients. This Court held:

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the state for one year would seem irrational and unconsti-

> tutional. But of course the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the strictest standard of whether it promotes a compelling State interest. Under this standard the waiting period requirement clearly violates the Equal Protection Clause.

Neither the Federal nor State Legislatures can show a compelling interest to justify why a poor person is deprived access to the same erotic material a rich man can easily view in the comfort of his own home. A review of **Stanley v. Georgia**, supra, and its background makes this proposition the next logical step.

In **Stanley**, the United States Supreme Court specifically held that the First and Fourteenth Amendments protect private possession of obscene press materials. Thus, inherent in the right to possess is the right to receive. Said the Court in **Stanley**:

> (3, 4) It is now well established that the Constitution protects the right to receive information and ideas. This freedom (of speech and press) . . . necessarily protects the right to receive . . . **Martin v. City of Struthers**, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943); see **Griswold v. Connecticut**, 381 U.S. 479, 482, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965); **Lamont v. Postmaster General**, 381 U.S. 301, 307-308, 85 S.Ct. 1493, 1496-1497, 14 L.Ed.2d 398 (1965) (Brennan, J., concurring); c.f. **Pierce v. Society of the Sisters**, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed.

1070 (1925). This right to receive information and ideas, regardless of their socialworth, see **Winters v. New York**, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society, 394 U.S. at 564.

It is interesting to note that in **Stanley** particular reliance is placed upon the opinions in **Martin v. City of Struthers**, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, and **Griswold v. Connecticut**, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, two cases which emphasize the First Amendment right to receive all media of expression. In **Martin**, Mr. Justice Black, speaking for the Court, said:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they choose to encourage a freedom which they believe essential if vigorous enlightenment was ever to triumph over slothful ignorance. **This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it.** The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved, 319 U.S. at 143, 146-147 [emphasis added].

In **Griswold v. Connecticut**, Mr. Justice Douglas, speaking for the Court, said:

> . . . The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. **The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read** . . . and freedom to teach . . . indeed the freedom of the entire university community . . . without those peripheral rights the specific rights would be less secure, 381 U.S. 482, 483, [emphasis added].

In **Lamont v. Postmaster General**, quoting Justice Brennan's concurring opinion, 381 U.S. 301, 308 (1965) (which was cited in **Stanley**):

> The right to receive publications . . . is a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addresses are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers.

The entire opinion and reasoning of the Supreme Court in **Stanley** take on the broader dimension of "mere private possession." It is true that the facts of **Stanley** involve a seizure of obscene materials from Stanley's bedroom but the language of the opinion clearly suggests that States have no business under the First and Fourteenth Amendments of the United States Constitution to

attempt to regulate the moral contents of a person's thoughts. This Court unequivocably held:

> Whatever the power of the State to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts. . . . The State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits. . . . . **Finally we are faced with the argument that the prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution . . . . we are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. . . . We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Roth** and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home, 394 U.S. at 566-568 (emphasis added).

Clearly, by its reliance upon cases involving distribution and receiving of expression, **Martin, Griswold, Lamont,** and others, **Stanley** also stands for the proposition that inherent in the right to possess is also the right to receive.

Several lower courts have already expressed the view Amici press instanter, for example, in **United States v. Lethe,** supra, that court held, "that a person has a constitutional right to buy or receive obscene material." 312 F.Supp. at 424. The court went on to state that:

> The final step is not difficult. Can it be reasonably argued that although the government may not directly prevent someone from buying a book, it may achieve the same result indirectly by making it a crime to sell the book to him? I think not, unless the Government can demonstrate it has some substantial interest in preventing the sale other than keeping the purchaser from buying, 312 F.Supp. at 424.

Similarly **United States v. Langford,** supra, held that in the absence of **Redrup v. New York,** 386 U.S. 767 (1967) proscriptions, that even though materials are hard core pornography, "accepting the major premise in **Stanley v. Georgia** as the law, the logic of the **Lethe** case and the result it reaches seem unassailable," 315 F.Supp. at 194.

The Second Circuit Court of Appeals likewise has come to a similar conclusion in **United States v. Dellatia,** 433 F.2d 1252 (2d Cir. 1970). There appellant's conviction for a violation of 18 USC, Section 1461 was reversed based in large part on **Stanley v. Georgia,** supra, and the additional fact that the Government had failed to show a compelling interest, i.e., **Redrup** type conduct. Similarly the United States Court of Appeals for the District of Columbia has held in **Williams v. District of Columbia,** 419 F.2d 638 (CADC 1969), that:

> ". . . That the State has no 'right to protect the individual's mind from the effects of obscenity' simply because it wishes 'to control the moral conduct and content of a person's thoughts.' This, the court said, would be inconsistent with the 'philosophy of the First Amendment,'" 419 F.2d at 645.

It would serve no useful purpose to supply additional cases of either Federal or State courts in which great reliance was placed on **Stanley v. Georgia,** supra. From the time **Stanley v. Georgia,** supra, was decided until this Court rendered its opinions on May 3, 1971, in both **United States v. Reidel,** 402 U.S. 351 (1971), and **United States v. Thirty-Seven Photographs,** 402 U.S. 363 (1971), the natural assumption by legal scholars and judicial officers as well as exhibitors and disseminators of allegedly obscene material, was that the logical extension of **Stanley** would permit consenting adults in nonobtrusive circumstances to purchase and/or exhibit even hard core pornography. This Court, of course, foreclosed, apparently, this logical extension in holding that the use of the United States mails to distribute admittedly obscene materials was conduct which would be punished by appropriate criminal process, **(Reidel)**; and further that the Tariff Act of 1930, Section 305(a), 19 USC, Section 1305(a) and related sections, were constitutional and did permit the seizure upon reentry into the United States' borders of admittedly obscene material, even though these materials were intended solely for private use, (37 **Photographs**). Amici contend of course that the issue of the right of the Federal Government to prohibit of in commerce in obscene material is separate and apart from the underlying philosophy and scope of **Stanley v. Georgia.** It seems clear

that in retrospect that both **Reidel**, supra, and **Thirty-Seven Photographs**, supra, fly in the face of **Stanley v. Georgia**, and the latter is far more consistent with both the historical and modern concept of the First Amendment, especially when tested by the Fifth and Fourteenth Amendments.

For this Court to hold otherwise would be to give to the citizens and residents of the United States an empty right under **Stanley v. Georgia**, supra. For, the right to receive in the privacy of one's own home, even hard core pornography, is meaningless unless one also has the collateral right to purchase such material. Obviously someone must have the right to sell or exhibit this material in order for **Stanley**, supra, to be available to the poor man as well as the rich.

D. IN THE ABSENCE OF EMPIRICAL DATA SUPPORTING THE ASSUMPTION THAT OBSCENE MATERIAL IS HARMFUL, THERE IS NO RATIONAL BASIS TO MAKE CRIMINAL THE BUYING, SELLING, RECEIVING, PUBLISHING, DISTRIBUTING, OR EXHIBITING OF SEXUALLY EROTIC MATERIALS TO ADULTS FOREWARNED OF ITS NATURE.

Law in any field, to be adequate and sound must rest on facts. It must grow out of experience. Thus research designed to make systematic investigations into human experience becomes indispensable to the healthy growth of the law. Erwin N. Griswald, Dean, Harvard Law School; Foreward in **Unraveling Juvenile Delinquency**, by Glueck, 1950.

The United States Congress found traffic in obscenity and pornography to be of national interest and further found that the Federal Government had a responsibility to investigate the gravity of the situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the dissemination of such material. The Commission on Obscenity and Pornography was established by Public Law 90-100 (1967).

Ironically,

> Before the findings of the commission were actually published, it was revealed that this body had drafted a report which was in direct contravention to what its sponsors believed such a commission would urge. **Censorship: For and Against,** Hart, pp. 7 (1971).

In, **The Report of the Commission on Obscenity and Pornography,** hereafter referred to as the **Report,** the Commission set forth the results of its study, and its various conclusions and recommendations, all of which were derived from the extensive socio-scientific study undertaken.

The focal point of the Commission's decision was that no social justification exists for the retention or enactment of broad legislation prohibiting the consensual distribution of sexual materials to adults and that the primary area of public concern was the thrusting of offensive materials upon unwilling recipients and the fear that these materials might be distributed to minors. The

Commission concluded that these two areas could be regulated effectively by legislative prohibitions, **Report** at 42-43.

The Commission's conclusion was based on several considerations, First:

> Extensive empirical investigations, both by the Commission and by others, provides **no evidence** that exposure to or use of explicit sexual materials play a significant role in the causation of social or individual harms, such as crime, delinquency, sexual or non-sexual deviancy or severe emotional disturbances. **Report** at 52 (and 56).

One study for example showed that eighty (80) percent of the social-psychiatric clinicians consulted reported that they never encountered a case in which "pornography" appeared to be a factor in producing anti-social sexual behavior. The study also found that eighty-four (84) percent of the psychiatrists and psychologists disagreed with the statement "persons exposed to pornography are more likely to engage in antisocial sexual acts than person's not exposed," **Report** at 161. The Commission in fact added that analysis of the United States Crime rates do not support the thesis of a causal connection between the availability of erotica and sex crimes among either juveniles or adults and that studies showed that adult sex offenders are not significantly different from other adults in exposure or in reported arousal or reported likelihood of engaging in sociosexual behavior following exposure to erotica, **Report** at 242.

It should further be noted that the limited amount of information concerning the effects of sexually explicit materials on children was a factor which led the Commission however to be restrictive in the area of minors.

A second consideration upon which the Commission reached its conclusion was that public opinion in America did not support the imposition of legal prohibitions on the right of adults to read or see explicit sexual materials. The majority of the American people presently are of the view that adults should be legally able to read or see explicit sexual materials if they wish to do so, **Report** at 43, 53.

Further findings were the fact that studies showed that explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults, society's attempts to legislate for adults in the area of obscenity have not been successful and are extremely unsatisfactory in their practical application; and the fact that expenditures of considerable law enforcement resources are involved where there appears no justification to support these expenditures, **Report** at 52-53.

Finally and of great importance to the Commission was:

> The spirit and letter of our constitution tell us that government should not seek to interfere with these rights (press and speech) unless a clear threat of harm makes that course imperative. Moreover, the possibility of the misuse of

> general obscenity statutes prohibiting distribution of books and films to adults constitute a continuing threat to the communication of ideas among Americans — one of the most important foundations of our liberties, **Report** at 54.

The Legal Panel of the Commission did an in depth and extremely comprehensive report of the legal history of obscenity decisions, **Report** at 293-369.

Of utmost importance is the Commission discussion of **Roth v. United States**, 354 U.S. 476 (1957), and subsequent cases. The Commission found that the **Roth**, supra, case held that prohibition upon the distribution of obscene material to consenting adults to be constituted without reliance upon authoritative findings or conclusions regarding the social effects of such material, **Report** at 357.

The Commission went on to say to 358:

> Developments since the Roth decision have suggested both practical and constitutional doubts about appropriateness of its conclusion that distribution of "obscene" materials to consenting adults may constitutionally be broadly prohibited without reference to considerations of social harm. These developments have been in three areas: (a) The enormous practical difficulties under **Roth** of meaningfully defining what is "obscene" for consenting adults and of fairly applying such definitions in legal proceedings; (b) changing public opinion regarding the need for and the wisdom of prohibiting distribution

of sexual materials to consenting adults; (c) Developing constitutional doctrine holding that free expression guarantees apply to "obscene" materials in at least some adult contexts.

The Commission went on to discuss all of the above points and put special emphasis on the Constitutional issues stating; at 358-359:

> The fundamental premise of **Roth** — that protections accorded to speech by the Constitution are wholly inapplicable to "obscene" material — was apparently rejected by the Supreme Court in 1969 in **Stanley v. Georgia.** There the court indicated that, even where material is "obscene", the individual citizen nevertheless has a constitutionally protected right, if he so wishes, to read or view such material at least in his own home. Obscenity prohibitions which interfere with this right appear to require the support of a sufficient governmental interest. The protection of juveniles from exposure to obscene materials and the protection of individual sensibilities against materials involuntary thrust upon persons who do not wish to see them were recognized in **Stanley** as legitimate governmental concerns. On the other hand, **Stanley** appears to have held that government may not rest prohibitions upon what consenting adults may read or view upon a desire to control their morality, or upon a desire to prevent crime or antisocial behavior, at least, **in the absence of a solid empirical foundation.** [Emphasis added.]

The areas where a rational basis for legislation prohibiting explicit sexual materials exists was stated in **Redrup v. New York,** 386 U.S. 767 (1967). These include situations where minors are involved, or where materials are thrust upon persons who do not wish to see them, or where pandering to non-consenting adults or juveniles has taken place. In fact it is these situations which the Commission felt should be regulated, **Report** at 56-62.

It is beyond question that both the State and Federal Governments must have a rational basis for enacting legislation, **Williams v. Lee Optical,** 348 U.S. 483 (1955); c.f. **Leary v. U. S.,** supra. No rational basis exists for having obscenity prohibition legislation where consenting adults are involved. This was clearly shown by the **Report.** The circumstances in **Buck v. Bell,** 274 U.S. 200 (1927), should be informative to this court in deciding the Constitutional issues involved instanter. In **Bell,** a Virginia statute allowed sterilization of feeble minded persons after very strict procedures were followed. This court found a rational basis for the statute as there was **scientific evidence** that such disease is hereditary. Instanter, no evidence can be adduced to show a rational basis for obscenity statutes relating to consenting adults as none exists. Thus, such legislation is truly in violation of the Fifth and Fourteenth Amendments.

To permit the First Amendment to be eroded without constitutional basis because of some unpopular sentiment toward the expression involved will result in the creation of numerous additional exceptions to that Amendment which will lead to the eventual destruction of this most important and time honored right.

CONCLUSION

Amici respectfully submit that this Court must hold that the First Amendment absolutely protects the right of a previously forewarned adult to buy, sell, receive, write, publish, distribute, disseminate and/or exhibit even hard core pornography and obscene material provided there is no assault or intrusion upon the sensibilities of other non-interested adults, no pandering, and no juvenile involvement. The Constitution of the United States, and the First Amendment thereto, stands as a bar against any limitation upon the right of adults to read or view sexually explicit material. The State and the Federal Governments' concern is properly limited to the dissemination of such material only where there is an assault or intrusion upon the sensibilities of other non-interested adults, pandering, or juvenile involvement.

Respectfully submitted,

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RALPH J. SCHWARZ, JR.,
MEL S. FRIEDMAN,
Amici Curiae.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

JOEL HIRSCHHORN,
Amicus Curiae